In the Supreme Court of the United States

OCTOBER TERM, 1921

IN EQUITY

No.....

THE STATE OF TEXAS ET AL., APPELLANTS,

vs.

UNITED STATES ET AL., APPELLEES.

AN APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS.

BRIEF FOR APPELLANT.

INTRODUCTORY STATEMENT.

This is an appeal from an order entered on the 21st day of September, 1921, by the District Court of the Eastern District of Texas, Circuit Judge Walker and District Judges West and Estes sitting, upon the application of the State of Texas, C. M. Cureton as Attorney General and in his individual capacity against the United States, the Interstate Commerce Commission and the Eastern Texas Railroad Company, the St. Louis Southwestern Railway Company of Texas, and the St. Louis Southwestern Railway Company, brought for the purpose of suspending and setting aside an order of the Interstate Commerce Commission, made and entered on the 2nd day of December, 1920, authorizing the Eastern Texas Railroad Company to abandon operation of its line of railway situated within the State of Texas and between the towns of Lufkin and Kennard.

The bill alleges ownership of the stock of the Eastern Texas Railroad Company by the St. Louis Southwestern Railway Company and a conspiracy between the three railroads named as de-

fendants to abandon operation of the road and asking an interlocutory injunction against each of the defendants named restraining them from carrying out the order of the Interstate Commerce Commission until the suit may be heard on its merits.

The suit was filed in accordance with the Act of October 23, 1913, known as the "District Court Act." No answer was filed by either of the defendants, but a motion was presented by the United States and the Interstate Commerce Commission asking that the bill be dismissed. Motion was also filed by the St. Louis Southwestern Railway Company of Texas and the St. Louis Southwestern Railway Company asking that suit be dismissed as to them on the ground that they were not parties to procuring the order from the Interstate Commerce Commission complained of, and, therefore, not proper parties to this suit. The motions of the United States and the Interstate Commerce Commission alone were presented and argued before the court, whereupon the court entered an order granting all of the motions, including that of the two railroad companies. Complainants then and there, in open court, duly excepted, filing their bills of exception and gave notice of appeal to the Supreme Court of the United States. The order of the court recited this fact and allowed the appeal.

Complainants' bill is presented in the record and the question in this case is whether or not the court erred in granting the motions of the several defendants as prayed for and in the terms set out in its order, as complained of in the bills of exception presented by plaintiffs.

ADDITIONAL STATEMENT.

The subject matter of this suit is in litigation in an action between the State of Texas and the Eastern Texas Railway Company in which its officers and attorneys are joined as parties defendant, said cause being No. 298 on the docket of this court for the October term, 1921. Motion has been filed to advance the hearing in this case for the same time that argument is had in the other case referred to.

The same questions of law, relative to the authority of the Inter-

state Commerce Commission, are presented in each case. Questions of procedure will be raised in this case not involved in the former appeal and likewise the former appeal has a question of jurisdiction not involved in this case.

The Law Supports the Bill.

The District Court Jurisdiction Act, passed by Congress and approved October 23, 1913 (38 S. L., 219) is the authority for filing this bill. Omitting that portion of the act abolishing the Commerce Court, we quote:

> "The venue of any suit hereafter brought to enforce, suspend or set aside in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party, or any of the parties, upon whose petition the order was made." * * *
>
> "No interlocutory injunction suspending or restraining the enforcement, operation or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission, shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge and unless the majority of said three judges shall concur in granting such application. When such application, as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States and to such other persons as may be defendants in the suit." * * *
>
> "The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest possible date after the expiration of the notices hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice of hearing, an interlocutory injunction, in

such case, if such appeal be taken within thirty days after the order in respect of which complaint is made, is granted or refused; and upon final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission, the same requirement as to judges and the same procedure as to expedition and appeal shall apply."

The foregoing act unquestionably authorizes the bill as against the United States, the Interstate Commerce Commission and "other parties."

The Eastern Texas Railroad Company was the applicant before the Interstate Commerce Commission. It was, therefore, a proper party defendant. The other two roads named as defendants were, according to the bill, the major portions of the same system of railroads as the Eastern Texas, one being the owner and the other a subsidiary of the owning company. They had acted with the Eastern Texas Railroad in obtaining the order complained of, owned the stock of the road, elected its officers and directors and operated its trains. They made the bond required of it by the Interstate Commerce Commission. On the face of the bill they were proper parties.

In presenting their motion to dismiss the bill, defendants, the United States and the Interstate Commerce Commission, interposed as their reason that the order complained of was not an affirmative order by the Interstate Commerce Commission, but was only negative, not mandatory but only permissive. That nothing was to be done by the Interstate Commerce Commission, under the order for which it could be restrained, its act was complete and no order that it had passed or could pass under the act authorizing it could harm the State of Texas nor its Attorney General, and, therefore, there was no equity in the bill.

In this interpretation of the act, appellants agree. Our view in this connection is consistent with the argument heretofore made on the same subject, but it is in conflict with the interpretation given the act by the defendant railroad companies when they proceeded to abandon the road without securing permission from the State of Texas, and the court should have granted the interlocu-

tory injunction as to the railroad company. The act was a mere permit from the Interstate Commerce Commission and not authority. The act authorizing it was passed for the purpose of protecting interstate commerce and not for the purpose of destroying intrastate commerce. We republish herewith the argument presented by the State of Texas on the interpretation of the act in the case of the State of Texas, Appellant, vs. Eastern Texas Railway Company et al., Appellees, being No. 298 for the October term, 1921, of this court, the section of the brief referred to being found on pages 11 to 17 and reading as follows:

A proper interpretation of paragraphs (18), (19), (20) and (21) of Section 1 of the Transportation Act does not exclude the authority of the State, but only directs the Interstate Commerce Commission to grant its authority, under conditions to be prescribed by it, for the withdrawal by the carrier from engagement as an interstate carrier.

In this connection we call attention to the language employed by Congress in the Transportation Act, which the railroad companies contend excludes the authority of the State:

> "From and after issuance of such certificate, and not before, the carrier by railway may, *without securing approval other than such certificate*, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby." (Paragraph (20), of Section 1.) (Italics ours.)

In order to properly understand the meaning of this language, it is necessary to discuss the principle of the act and the purpose for which it was enacted.

The United States had taken charge of the railroads of the country and operated same to meet the emergencies of the war. Unusual legislation had been passed which could be held constitutional only on the ground that an emergency demanded it. The roads are now to be turned back to the owners. The theory asserted itself in Congress that the roads were in a weak and helpless condition, and in order to sustain them it would be necessary

for the government to extend a helping hand. The Interstate Commerce Commission was delegated to perform this service. It was authorized, under its interpretation of the act to divide the country into such number of groups as it may see fit and fix such rates as may be necessary for passengers and freight as would bring to all of the railroads within the group a specified return on the valuations found for all the carriers. Thus was linked together the entire system, and Congress foresaw that in order to foster and protect the carriers, it would be necessary to make immediate extensions and connections. Provisions were made by Congress to aid in financing such extensions in order that certain helpless carriers may have their lines extended, that they may perform fully the service and realize to the fullest extent the income available to it. At the same time Congress seemed to have recognized that certain carriers would be a burden to the entire group because they would not earn more than the operating expense, and their values added to the total values would demand the fixing of a higher rate for all of the territory to which such carrier would not contribute its proportionate share. It was, therefore, provided that such carrier may be relieved either upon their own application or upon the Commission's initiative from engaging in interstate commerce—as expressed by counsel in arguing the case in the court below, there would be dead limbs which a good husbandman would see fit to prune from its tree. To this theory, and thus far, we subscribe. We assert, however, that when Congress had withdrawn interstate commerce from such carriers, by giving permission for their abandonment, the full purpose of the act has been accomplished and no further action was authorized. Let us look to this act and other acts of Congress for its interpretation.

Paragraphs (18), (19) and (20) provide alike for the extension and abandonment by carriers of their lines. If the language used in these paragraphs is complete and sufficient to exclude the State from any authority in the abandonment of the road, it is likewise sufficient to exclude such authority in the extension by a carrier of its line. Congress was not satisfied, however, to stop here, for

it may be necessary to extend the line in order to properly foster and properly regulate interstate commerce, and to this end paragraph (21) was added, giving to the Commission power to authorize or require carriers to provide themselves with adequate facilities or to extend their line or lines, making provision for the enforcement of such order. Section (21) has no application to abandonments, but solely to extensions.

Under the authority given, it may be stated that the power of the State to forbid extensions has been superseded. It may be, with good reason argued also, that extensions become necessary to interstate commerce whether agreeable to the State in which they are made or not, and this given as a reason for the insertion of paragraph (21). If that same argument applied to abandonments, Section (21) should then have included abandonments, as well as extensions, but it does not. To our mind this is sufficient to answer the argument that the State is excluded from any activity by the provision quoted from paragraph (20), but that is not all.

The language employed in paragraph (20), towit: "without securing approval other than such certificates," is not the language customarily used by Congress when it excludes the authority of a State to act, nor is it sufficient to overcome the effect of the language used in paragraph (17) relating to the same subject. From it we quote:

> "Provided, however, that nothing in this act shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

Certainly this language shows Congress recognizes, in the act, the police powers of the State. The interpretation sought by appellees, and that given by the court below, recognizes no vestige of right or power in the State, but, on the contrary, annihilates the subject of its control. It is our contention that to overcome this provision and strip the State of all rights in the regulation of its intrastate commerce and its carriers the language immedi-

ately following this must be at least as plain and clear as that usually employed by Congress to exclude the State's authority in legislation on the same or similar subjects.

Congress has used language to exclude State authority both prior to and subsequent to the passage of the statute under discussion. When the country was involved in war and it became necessary that a central power should take charge of and control the commerce of the country without interference and when time was the essence of its power, when it became necessary that the State should surrender every right which it had to the central government, the act was passed giving to the President such power. Small limitations were placed upon his authority, but Congress, composed of the representatives elected from the several States, was careful to preserve as far as possible the police powers of the States, and after making the provisions referred to, inserted a section reading as follows:

> "Section 15. That nothing in this act shall be construed to amend, repeal, impair or affect the existing laws or powers of the States in relation to taxation or the lawful police regulation of the several States, except wherein such laws, powers or regulations may affect the transportation of troops, war material, government supplies or the issuing of stocks and bonds." (Federal Control Act.)

The intention of Congress in the foregoing cannot be mistaken. The time had not arrived when Congress was willing, even in so great an emergency as the act required, to strip the States of their rights and police powers nor to infringe upon them except for the purposes stated, which were declared to be necessary during the emergency.

The emergency passed and Congress quickly returned to the carriers their property. We have referred to its interest in rehabilitation by the carriers of their property to the end that the commerce of the country be not crippled at an important period in its commercial history.

As a further aid to the carrier and to insure the rehabilitation of their property, and for the further purpose of securing the gov-

ernment in any indebtedness by the several carriers to the government, an act was passed providing for the issuance of securities to extend over a period not exceeding ten years for the purpose of refunding the carriers' indebtedness to the United States. This is expressed in Section 207 of the Transportation Act. It was necessary that such indebtedness be refunded regardless of the requirements of any State. The indebtedness had been made. They had been made during an emergency when a State could afford to forego its rights and suspend its police powers for the common good. That the government may be able to lend a further helping hand and the commerce of the country properly protected, it was necessary that security be given for such indebtedness and the power of the State to prevent it was excluded. The language used by Congress for this purpose cannot be mistaken. We copy the language as follows:

> "(g) A carrier may issue evidences of indebtedness, pursuant to this section, without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification."

Further providing for the carriers in this respect, Congress created a revolving fund to be used in making new loans to railroads. Such new loans may be necessary in order to provide equipment, betterments and extensions to meet the conditions arising with the close of the war and in order to conserve the interest of the general public. An emergency is here seen as in the foregoing, and Congress again uses language similar to that quoted above and which cannot be mistaken. We quote from Section 210:

> "(f) A carrier may issue evidences of indebtedness to the United States pursuant to this section without the authorization or approval of any authority, State or Federal, and without compliance with any requirement, State or Federal, as to notification."

If, during the great emergency existing, which called for the operation of the railroads of the country by the central government to the exclusion of the owners, Congress saw fit to preserve

the police powers of the State, so far as was possible for the period of this emergency when it may be presumed that all the State's authority has been superseded, and if after its return, the acts were passed as referred to, which necessitated the power of the State, with reference to the issuance of securities, be superseded, Congress deemed it necessary in order that the authority of the State be excluded to say so in plain and unmistakable language, should, then, this court feel called upon to construe the language as contended by appellees with reference to abandonments by carriers of the lines so as to exclude the authorities, the police powers of the State, when such exclusions are not necessary to meet the ends in view in passing the enactment, particularly in view of the distinctions made by the wording of the act between the powers of the Commission to order abandonment and its power to compel extensions? "

We submit in the light of reasons given and the language quoted that Congress did not intend by the act, and that it does not exclude the authority of the State, but that the full purpose is served and the language of the law has been complied with when the Interstate Commerce Commission gives to the carrier its authority to abandon the operation of its line as an interstate carrier, leaving it then to be dealt with by the State creating its corporation and to which it owes its existence and with which it has a charter contract and obligation.

It makes no difference what the form of the order may be if authority is given to the carrier to abandon its roads contrary to the laws of the State of Texas. If the order is affirmative, injury is done to the State of Texas and to the parties complaining herein, there is equity in the bill and the court erred in dismissing it. The only theory upon which a court could grant the motion was that stated by it, that the act is constitutional and the further conclusion must be reached, even though not stated by them in an opinion that they held the act to give no authority to the carrier to abandon its operation, but was merely permissive so far as interstate commerce may be affected.

Attention is called to the further fact that the Eastern Texas

Railroad Company is a party defendant and that it filed no motion to dismiss as to it. The court's attention is further called to the record for the fact that this is an application for an interlocutory injunction, the court being called in vacation by the terms of the act and it is without authority to dismiss the bill or to do anything further than to grant or refuse the interlocutory injunction. Certainly it could not, under the motions filed, dismiss the bill as to the Eastern Texas Railroad Company, a party defendant.

Inasmuch as attorneys representing the St. Louis Southwestern Railway Company of Texas and the St. Louis Southwestern Railway Company appeared in behalf of a motion to dismiss the bill and concurred in the argument presented by the Assistant Attorney General of the United States and counsel representing the Interstate Commerce Commission, we are presuming that this court will follow the interpretation given the act and the meaning and extent claimed by them for the order which this bill seeks to set aside. Under this interpretation we will proceed.

The Bill Complaining of the Defendant Carriers Should Be Reinstated and the Court Below Directed to Issue an Injunction.

If the order is only permissive and not directory, the carrier must comply with the lawful requirements of the State of Texas. The laws of the State prohibiting abandonment of railroads would then, in no sense, be an embarrassment to interstate commerce or the lawful orders of the Interstate Commerce Commission. In this position, the State of Texas is consistent. We quote the following from the brief heretofore referred to in the case of the State of Texas, Appellant, vs. Eastern Texas Railroad Company, Appellee, No. 298, October term, 1921, being from pages 22 to 30 of said brief:

The lawful powers of a State may control the physical properties of its private corporations and make rules and regulations therefor in accordance with the terms of its charter contract, with its amendments, and the laws of the State which enter into and become a part of such charter contract so long as such action

does not become a direct burden on interstate commerce and so long as the exerting of power over its corporations does not prevent or embarrass exercise by Congress of any power with which it is vested by the Constitution. (B. & O. Ry. vs. Maryland, 21 Wallace, 156-173; Northern Securities Co. vs. United States, 193 U. S., 317.)

The Eastern Texas Railroad Company has a charter contract with the State of Texas by which it agreed to operate its line of railroad for a period of twenty-five years, beginning November 1, 1900. The road is situated wholly within the State of Texas and its charter authorized it to do business as a common carrier within the State of Texas and further authorized it to receive freight and passengers from connecting lines without designating whether such freight and passengers should be interstate freight and passengers or not. The charter also adopted all laws that may be passed by the Legislature of the State of Texas in regulating common carriers doing business wholly within the State, and by the terms of such laws they became a part of its charter contract.

At an early day, and before the building of steam railroads, Chief Justice Marshall wrote the opinion in Gibbons vs. Ogden. He recognized then the rights of the State to regulate its internal commerce and this recognition was expressed and repeated in words directly to that effect. This court has ever followed this opinion. So far as we know, no part of it has ever been set aside. It is quoted by appellee with approval. We call attention to the fact that in this opinion the court recognized the right of the State to control the physical properties of carriers within its bounds though they have engaged in interstate commerce. On page 203, in summarizing a mass of legislation not surrendered to a general government, and which it was observed could be most advantageously exercised by the State itself, the Chief Justice included among them "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of the State and those with respect to turnpike roads, ferries, etc." What was the relation, at that time, of turn-

pike roads and ferries to interstate commerce? They are practically extinct at the present day and time and have been superseded by railroads and railroad bridges. No more are the physical properties of the railroad today the instruments of commerce than were turnpike roads and ferries at the time Justice Marshall wrote this opinion. On page 206, asserting the supremacy of Congress to legislate, he limits it "so far as may be necessary to control" State laws, "for the regulation of commerce." On page 208, however, he acknowledges the power of a State to regulate its police, its domestic trade and to govern its own citizens, including of necessity the corporations created by it, which power to regulate gives to the State the power to legislate to a "considerable extent." If to the State is reserved the power to regulate, it must then follow that Congress does not have the power with respect to the same subject to annihilate or exterminate.

It is not the contention of the State of Texas that it can enforce the provisions of this contract when same embarrasses the Federal government in the enforcement of any of its laws passed in accordance with its Constitution and particularly laws in regulation of interstate commerce. It is the position of the State, however, that when the Federal government, acting through Congress or its committee or commission, designated the Interstate Commerce Commission, withdraws the patronage of interstate commerce from the Eastern Texas Railroad, it has reached the limit of its authority. The road ceases to be engaged in interstate commerce and its physical properties are of a nature that it is henceforth beyond the power of Congress to exercise any influence over it. Congress has no power of extermination. There is no harm in the physical property itself that gives to Congress the power to exterminate it when it has been released from its obligations to the Federal government by the withdrawal from it its privilege of carrying the mail, and receiving interstate passengers and freight. Corporate obligations are in no manner affected, and it must then apply to the State which created it, who alone can give authority for its abandonment.

It is within the conception of practical business men that the

carrier, though withdrawing from interstate commerce, may yet serve a useful purpose to its State and comply with the obligations which it assumed to the State creating it. It must, therefore, be a matter of judicial ascertainment before there is an authority who can say the contractual obligations to its State have been performed and such judicial ascertainment must be founded upon the facts properly pleaded before a court of competent jurisdiction created either by the State or by Congress in accordance with its power under the Constitution to create courts.

This court has frequently held and particularly in Louisville & Nashville Railway Co. vs. Kentucky, 161 U. S., 677, 702, that it has never been supposed that the dominant power of Congress over interstate commerce took from the States the power of legislation with respect to the instruments of such commerce so far as the legislation was within its ordinary police power. This case recognized that to the States belong the power to create and to regulate the instruments of such commerce as far as necessary to the conservation of the public interest. It quotes with approval former holdings of the court to the effect that Congress could not limit the power of the States to create corporations, define their purposes, fix the amount of their capital and determine who may buy, own and sell their stock. (Quoted with approval in Northern Securities Co. vs. United States, supra.)

Would any force be added to this if the court had said that the States have power to fix the time in which the corporations which they create shall live? Is it not true that the Federal government in the exercise of authority whereby the corporation is destroyed would take from the State, in the self-same act, all the authority conceded to it under its police power to create, fix the purpose, amount of capital and determine who may buy, own and sell the stock of its corporations? Could it not, in the next instant, after the creation by the State of a corporation defeat its action by ordering its destruction and would not such destruction effectively deny to the State all of its other powers of regulation?

That the State has a commerce purely internal, not mixed with interstate commerce and having such limited influence over inter-

state commerce as to relieve it from the regulation of the Federal government, has been continually recognized by Congress and by all the courts. From the court's opinion in Northern Securities Co. vs. United States, supra (page 349) we quote this language:

> "The regulation or control of purely domestic commerce is, of course, with the State, and Congress has no direct power over it so long as what is done by the State does not interfere with the operations of the general government, or any legal enactment of Congress."

Is it conceivable that the State, having a commerce over which it exercises exclusive control, cannot control a corporation engaged in such commerce? Would it not be as reasonable to say that Congress can exclusively regulate the commerce of a nation without any power to regulate the instruments of such commerce, and is it not by the same process of reasoning that Congress is given any power whatever to regulate or control, in any manner, the instruments of interstate commerce? The reasoning applying to one applies also to the other, and it would be fallacious to conclude that the time has arrived, or will arrive, when the State has no commerce except that which is commingled with and becomes a part of interstate commerce; that though it can regulate its intrastate commerce, and though it may create the corporations which are to carry it on and give such corporations life, it cannot determine the number of their years. That its creatures whose purpose is determined by it and whose contracts are recorded in its archives, can, in the exercise of a privilege which it gives also in interstate commerce, abstract from the State all power which it had under it and defeat the State in all of its rights, under the Constitution of the State, under its laws and under the terms of its charter, while the carrier at the same time claims the privileges and immunities which its creator gives. For is it not a proper conclusion that in the event the Federal government directs the abandonment by the carrier of its property, directs its sale and disposition, that it thereby withdraws it from every vestige of power which the State has over it under its police power or authority? The State, in such event, must stand by with folded arms, stripped

of every power which the Constitution of the United States guarantees to it and which it has heretofore exercised without dispute from any source and see the creature of its creation exterminated. It is not conceivable that the constitutional provision granting to Congress the power to regulate commerce gives to it such power superior to the guarantee which that same Constitution directly gives to the States ratifying it, and that, through any broadening of the powers under such condition, through judicial interpretation, should the Congress be permitted to annihilate the privileges guaranteed to a State, in the pretense of exercising remotely its authority to regulate commerce. We repeat that there is no contention upon the part of the State of Texas that it has power to endow its corporations with authority to restrain interstate commerce or international commerce to disobey the national will as manifested in legal enactments of Congress, but with this same thought we reassert under a full assurance from the decisions of the courts that when the Interstate Commerce Commission gave the Eastern Texas Railroad Company its authority to abandon its engagement in interstate commerce, it reached the full power of Congress under the Constitution and the right of the State of Texas to compel the continuance by the defendant, appellee here, of its engagement in intrastate commerce in no manner embarrasses the Congress in the exercise of its legal rights and no further affects interstate commerce than does each and every individual, occupation or profession which produces goods for shipment or demands in any way or furnishes patronage to interstate commerce. It can do no more than produce, at the point of contact with interstate carriers, freight and passengers which may be delivered to them for transportation and which they, under the rules and regulation of the Interstate Commerce Commission may or may not receive. Does not the farmer who raises his products in this vicinity and hauls them to market do as much? To be mentioned also are the manufacturing plants, including saw mills, brick kilns, foundries and other industries at the particular point in question as well as mines and quarries, each producing articles for transportation to be received under the rules and regulations of the

Interstate Commerce Commission, because their products are to be transported, and can it be said that they and each of them so affect interstate commerce and, regardless of their nature, they may be regulated or exterminated at the will of Congress or of the Interstate Commerce Commission when so directed by Congress?

Quoting again from the decisions of this court, in Atlantic Coast Line Co. vs. North Carolina Corporation, 206 U. S., 1, it was said in the opinion:

> "The elementary proposition that railroads, from the public nature of the business by them carried on and the interest which the public have in their operation, are subject as to their State business to State regulation, which may be exerted either directly by the legislative authority or by administrative bodies endowed with power to that end, is not and could not be successfully questioned, in view of the long line of authorities sustaining that doctrine."

Chief Justice White quoted this with approval in M. P. R. R. Co. vs. Kansas, 216 U. S., 262, and commenting thereon held that acts of the State in compelling the running of a train within the State by a railroad engaged in interstate commerce, incorporated by another State, that unless for some reason the order must be treated as such an arbitrary and unreasonable exercise as to cause it to be in effect not a regulation but an infringement on the right of ownership or circumstances considered as operating a direct burden upon interstate commerce, the State's order must be complied with, thus holding the action of the State within its police power. Conceive, if you can, the right of a State to force the running of trains by a road within its territory which is incorporated under the laws of another State and, at the same time, this State would be denied the right to enforce the contractual obligation of such carrier to operate trains at all. When we have reconciled this thought with proper reasoning based upon such decisions of our courts, then we may properly concede that Congress has the power claimed by it and exercised by the Interstate Commerce Commission in authorizing and directing the abandonment by the defend-

ant of its operation and the sale and alienation by it of all of its physical properties within the State of Texas.

In the case at bar, we are not left to indulge in uncertain implications for the reason that appellant is protected in all of its contentions by a charter contract whose words are definite, the purport of which appellee makes no effort to deny. There is read into this charter a previously adopted constitution and under it previously enacted statutes.

The contract guarantees the operation of trains on appellee's line of railroad for a period of twenty-five years. That time has not expired. The constitutional statutes referred to forbid the abandonment of operation by all common carriers without the consent of the State of Texas, regardless of whether this period of time has expired or not. The enforcement of this contract by appellant does not preclude the Interstate Commerce Commission from withdrawing from appellee all patronage of interstate commerce and, therefore, imposes no burden upon interstate commerce. We therefore insist that the power to order the abandonment by appellee of its line of railroad does not lie with Congress nor with the Interstate Commerce Commission.

If the State of Texas has the power to control the physical properties of its corporations and compel the operation by carriers engaged in intrastate commerce when same does not embarrass interstate commerce or the lawful orders of the Interstate Commerce Commission or the constitutional acts of Congress, then it is certain that in this case, the State's remedy in equity is sufficient to restrain the alleged action of the defendant carriers and the bill should be reinstated and the court directed to hear it on its merits with the proper instruction as to the interpretation which the Supreme Court gives of Sections (18) to (21) of the Transportation Act under which authority the order was issued and the court below should be instructed to uphold the laws of the State of Texas relative to abandonment by carriers of their line of railroad and injunctions sought as against the carriers should be ordered.

Conclusion.

In this brief, we have eliminated all discussion as to the constitutionality of the act. Believing as we do that the interpretation given the act does not supersede any authority of the State, so far as abandonments are concerned, and concurring in that view taken by appellees before the trial court, we ask that this court so interpret the act and that an opinion be rendered to that effect and proper order for the disposition of the suit be made.

C. M. Cureton,
Attorney General.
Walace Hawkins,
Tom L. Beauchamp,
Assistant Attorneys General,
Solicitors for Appellants.

Austin, Texas, October 3, 1921.